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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JAMES A. SAUERS, on Habeas Corpus.	H034179 (Santa Clara County Super. Ct. No. 78855)

I. INTRODUCTION

Following a hearing in July 2008, the Board of Parole Hearings (Board) found petitioner James A. Sauers unsuitable for parole. Sauers petitioned the superior court for a writ of habeas corpus, alleging that the Board's decision denied him due process of law. The superior court granted the petition, concluding that the matter should be remanded to the Board for a new hearing conducted in conformance with the standard set by the Supreme Court in *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), which clarified the law pertaining to parole denials. Respondent, John Marshall, Warden at the California Men's Colony (Warden) appeals from that order.[1] We conclude that the superior court was correct in remanding the matter to the Board. Accordingly, we shall affirm.

II. FACTS

A. The Commitment Offense

Sauers killed his wife in 1981. The Board incorporated the description of the commitment offense as set forth in the June 2007 Life Prisoner Evaluation. According to

[1] Even though the habeas petition concerns the action of the Board, the respondent is the warden of the prison where the inmate is incarcerated. (Pen. Code, § 1477.)

that report, at the time of the murder, Sauers had recently learned that his wife was having an affair with one of her coworkers; he had been told that someone had seen her having sex in a car with her lover. She had also been purchasing items with the couple's credit cards and returning them for cash to support her methamphetamine habit. On January 29, 1981, after his wife refused to stop seeing the other man, Sauers demanded that she leave their home and give him custody of the children. She insisted she would stay and would continue the affair. Sauers went out to his pickup truck and retrieved a semi-automatic rifle. As he did so, he heard his wife screaming that he was going to kill her. He got the gun and returned to the house. His wife had locked herself in the bathroom. Sauers smashed the bathroom door and shot his wife eight times, five times in the head and neck. The couple's two young daughters witnessed the murder and corroborated Sauers's account. A jury convicted Sauers of second degree murder. He was sentenced to 15 years to life in prison.

B. Prior Record, Social History, Institutional Behavior, Parole Plans

Sauers was born in 1939, making him 69 years old in 2008. He had had regular employment most of his life. He was first married at 19 and divorced 10 years later. There were two children of that marriage. The victim was Sauers's second wife. Sauers had two daughters from that marriage.

Sauers had no criminal history and no history of committing crimes as a juvenile. His prison record was spotless. During the 26 years Sauers had been incarcerated he had suffered no discipline or disciplinary counseling whatsoever. He continually participated in vocational assignments. He had taken courses in vocational data processing, small business and light industry, office services, and information technology. He had received a number of laudatory comments. He was rated as above-average to outstanding in his work reports and grades. One report noted that he was "viewed as an asset to every program he's been in." He had also been placed on the warden's permanent critical worker list.

Sauers participated in therapy and self help programs in 1993, 1995, and 2002. He received individual therapy in 1994 and participated in several lifer groups, especially in the 1990s. Sauers was not involved in any self help groups at the time of the 2008 hearing. He said that was because there were no such groups offered in A quad where he was housed.

If released on parole, Sauers planned to live with his sister in Texas. His sister submitted a letter confirming those arrangements. A daughter had offered him a place to stay on her property in Idaho. He was eligible for approximately $1,500 per month in Social Security benefits and planned to work part time, as well.

C. Psychological Factors

The Board cited a psychological report by Katherine Twohy, Ph.D., dated July 5, 2007, in which the psychologist stated, "When Mr. Sauers was asked to discuss his life crime he reported that his wife changed 180 degrees during their marriage. He stated that she abused and endangered their children, used his credit cards up to the maximum and did not pay the bills as she was supposed to, was having an extramarital affair, which she refused to stop, and was abusing drugs. He reported that on the day of the crime he told his wife to leave and she refused. He said, 'I shot her, but then I called the police.'. . . When asked what he might have done to avoid committing the crime he emphatically stated, 'There was nothing else I could have done given the circumstances.' He was unable or unwilling to discuss causative factors and said, 'You can't look back. There's no point in doing a coulda, woulda, shoulda kind of thing.' He stated that his crime happened a long time ago, it was brought on by his excessive stress from his job, his wife's drug use, her abuse of the children, and her sexual infidelity. He also said, 'I would never do anything like that again.' He added that at this point in his life, particularly because of his prostate illness, he is uninterested in being in any romantic or sexual relationship."

Twohy diagnosed Sauers as suffering from narcissistic personality disorder and opined that there was a "moderate" likelihood that Sauers would become involved in a violent offense if released into the free community. She recognized that he had abided by the rules while in prison but, "his lack of insight into his crime and into his own personality are factors that indicate a higher risk of violence than would be expected looking only at his history, his age, his intelligence, and his demeanor. Additionally, he has not made any apparent attempts to get self-help or to earn positive chronos as was suggested to him at the last hearing."

Sauers explained that his examination by Twohy was very different than the other psychological examinations he had had, all of which found him to be a low risk of violence. Twohy had been very aggressive, commencing the examination with the pronouncement, "Anything you say here will be held against you in a court of law." Sauers further stated, "As far as no insight, I know exactly why what happened happened, and why I did what I did, and how it happened, and it can never happen again."

D. Community Opposition

The chief of police for the San Jose Police Department sent a letter opposing Sauers's release on parole. He based his opposition on "the nature of the crime" and "the totality of the circumstances."

A representative from the district attorney's office appeared by telephone. She acknowledged that Twohy's psychological report was "certainly" unlike those issued previously, all of which had found Sauers to be a low to minimal risk of danger to society if released. Nevertheless, the district attorney opposed Sauers's release on parole due to the "cruel, callous, and atrocious manner" in which he had carried out the crime and the fact that Twohy found him to have "shown a remarkable lack of insight" into the cause of the crime.

E. Inmate's Argument

Sauers's attorney argued on Sauers's behalf, quoting from the numerous other psychological reports going back as far as 1985, all of which showed Sauers to be a low to "minimal" risk of violence if released.

F. The Board's Decision

The Board denied parole, concluding that Sauers "would pose an unreasonable risk of danger to society or a threat to public safety if released from prison." The Board went on, "We did certainly consider the commitment offense, and the commitment offense does weigh against suitability. The Panel noted it was carried out in an especially cruel and callous manner. . . . The victim was shot with a rifle that you retrieved from a motor vehicle and died as a result of the wounds. . . . [Y]ou had any number of opportunities to stop, first being not to even go to the vehicle in a moment of anger to obtain the weapon, and also numerous times leading up to the point where you were able to gain entry into the bathroom, where your wife was attempting to hide. We noted the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering in that your wife was able to articulate the fear that you were going to kill her. The Panel also took note of the fact that all of this occurred in front of your two young children." The Board further noted that the victim had suffered eight gunshot wounds, five to the face and neck. The Board acknowledged that Sauers was the one who called the emergency responders.

The Board's decision went on to find that Sauers's motive was trivial "because there were so many other options that were available to you, up to and including counseling or just dissolving the relationship. There certainly was no need for any person to lose their life over essentially a marriage that just wasn't working anymore." Sauers's statement that it would not happen again was not reassuring since he had no prior history of violence when he committed the crime.

In the area of institutional behavior, the Board observed, "other than the area of getting the self-help" Sauers had "done well." The Board cited Twohy's 2007 psychological report, which indicated that Sauers had a "profound lack of insight and an unwillingness to involve [himself] in treatment and self-help groups, which has been recommended repeatedly throughout [his] incarceration, and that in this domain that [he] present[ed] a moderate risk of future violence." The Board requested a new psychological report be prepared before the next hearing.

The Board acknowledged that Sauers would have enough money to support himself on parole, given his anticipated Social Security benefits and his plan to work part time. However, the Board characterized his parole plans as "unrealistic." "The Panel cannot--and that's just an absolute--the Panel cannot allow you to parole out of state. Once you're given a date you can request that your parole be transferred, and you can either do that at the time you're paroled or you can do it subsequent." Sauers was encouraged to speak with his counselor about transitional housing programs.

The Board commended Sauers on his good work reports and the fact that he had been disciplinary free "for such an extensive period of time," but concluded that the favorable factors did not outweigh the unsuitability factors and that it was "not reasonable to expect that parole would be granted at a hearing during the following two years. The specific reasons for this finding are, again, that we did have the plea to the shooting death of your wife, Illona Candice Sanders [*sic*], who was 30 years of age at the time, victim being shot eight times with a .22 caliber rifle while she was attempting to hide in the bathroom of the home that you shared with her. Separate decision, we once again noted the fact that the homicide did occur in front of two very young children who were in the home at the same time. And again, with respect to the offense that was carried out in an especially callous disregard for human suffering, the victim had already, to a certain degree, formulated that she was in extreme peril by making the statement that you were going to kill her, attempting to hide herself in the bathroom unsuccessfully after

the bathroom door was forcibly opened, and again, the victim was shot eight times, five of the wounds being in the victim's face and neck, those being the wounds that ultimately led to the victim's demise. The recent psychological report from Dr. Twohy from June of 2007 does indicate a need for a longer period of observation and evaluation, and also the Panel's conclusion that you haven't completed the necessary programming that's going to be essential to your adjustment and you need additional time to gain this programming, and principally it's in the area of self-help. The Panel did take the initiative to verify the statement that you made about the unavailability of programs on quad A. We were also told that there are opportunity [*sic*] to request that you can participate in programs on other quads, and also certainly it never ever eliminates the need and responsibility that you have to conduct self-study that can be documented. It's certainly within your power to go to the library and obtain resources."

G. The Petition for Writ of Habeas Corpus

Sauers petitioned the superior court for a writ of habeas corpus, arguing that there was no evidence to support the finding that he would pose an unreasonable risk of danger to the public if released. The superior court granted habeas relief by order dated April 8, 2009. The superior court concluded that the Board had not applied the standard required by the Supreme Court in *Lawrence*, but instead had rested its denial of parole on the nature of the offense and a history of instability without articulating any nexus between those findings and the finding of present dangerousness. The court's order states, "The Board's primary reason for denying parole to Petitioner was that the commitment offense 'was carried out in an especially cruel and callous manner.' " The court further found, "In deciding Petitioner's case, the Board denied parole based upon certain negative criteria without articulating how the criteria make Petitioner an unreasonable risk to society today." The Board "does not appear to have considered, and it definitely did not

articulate, the effect of the suitability factor contained in [California Code of Regulations],[2] Title 15, § 2404, subdivision (b)(4) ('The prisoner committed the crime as the result of particular stress in his life . . . .')." "Although the Board discussed other issues in addition to the commitment offense, it did not do so within the context of a nexus analysis."

The superior court's order concludes: "Because Petitioner did not receive due process pursuant to *Lawrence*, the Petition is granted, and the matter is remanded to the Board to conduct a further hearing under the guidelines set forth by the California Supreme Court. The Board shall conduct this further hearing within 95 days of the date of this order barring a request for extension of time from Petitioner." The Warden has filed this timely appeal.[3]

III. ISSUES

The Warden's primary argument is that there is "some evidence" to support the Board's decision and that is enough to uphold the Board's order. Secondarily, the Warden argues that, if there is not some evidence, then the trial court should have remanded the matter to the Board with instructions to proceed according to due process.

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[2] Hereafter, all undesignated section references and all further references to regulations are to title 15 of the California Code of Regulations.

[3] The Attorney General petitioned this court for a writ of supersedeas to stay the superior court's order. We denied the writ. It appears the rehearing has been held so that, arguably, this appeal is moot. But neither party has requested dismissal of the appeal. Rather, the parties presume that the matter is not moot because the Board's order following rehearing is not yet final. Even if the current appeal is technically moot, we decline to dismiss it on our own motion because the issues involved may recur as between Sauers and the Board. (Cf. *Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 512, fn. 11.)

IV. LEGAL FRAMEWORK

A. The Statutory and Regulatory Framework

We have set forth the legal framework for review of parole decisions many times in the past. (See, e.g., *In re Lewis* (2009) 172 Cal.App.4th 13, 26-27; *In re Criscione* (2009) 173 Cal.App.4th 60, 72-74.) Briefly, the Board "shall" set a parole release date "unless [the Board] determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual . . . ." (Pen. Code, § 3041, subd. (b).) "Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." (§ 2402, subd. (a).)

In making its determination, the Board must consider all "relevant, reliable information." (§ 2402, subd. (b).) Specific factors that the Board must consider are listed in section 2402, subdivisions (c) and (d). Factors tending to show unsuitability include that the inmate committed the offense in "an especially heinous, atrocious or cruel manner," possesses a previous record of violence, has an unstable social history, has previously sexually assaulted another individual in a sadistic manner, has a lengthy history of severe mental problems related to the offense, and has engaged in serious misconduct while in prison. (§ 2402, subd. (c)(1)-(6).) Factors that show suitability are the lack of any history of committing crimes as a juvenile (*id.*, subd. (d)(1)), a stable social history (*id.*, subd. (d)(2)), acts demonstrating that the prisoner "understands the nature and magnitude of the offense" (*id.*, subd. (d)(3)), evidence that the prisoner committed the crime as the result of significant stress in his life (*id.*, subd. (d)(4)), lack of criminal history (*id.*, subd. (d)(6)), the prisoner's age (*id.*, subd. (d)(7)), realistic plans for

the future (*id.*, subd. (d)(8)), and participation in institutional activities that "indicate an enhanced ability to function within the law upon release" (*id.*, subd. (d)(9)).[4]

B. The Board's Discretion

Parole release decisions are essentially discretionary; they "entail the Board's attempt to predict by subjective analysis" the inmate's suitability for release on parole. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655.) Such a prediction requires analysis of individualized factors on a case-by-case basis and the Board's discretion in that regard is " ' "almost unlimited." ' " (*Ibid*.) But as *Lawrence* clarified, "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Lawrence*, *supra*, 44 Cal.4th at p. 1212.) Relevance to the issue of the inmate's current risk to public safety is the key. Accordingly, in exercising its discretion, the Board "must consider all relevant statutory factors, including those that relate to postconviction conduct and rehabilitation." (*Id*. at p. 1219.) That "requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision--the determination of current dangerousness." (*Id.* at p. 1210.)

C. Standard of Review of the Board's Decision

Judicial review of the Board's decision is very deferential. At bottom, to support the Board's decision, "[o]nly a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the [Board]. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the [Board], but the decision must reflect an individualized consideration of the specified criteria and

[4] Not pertinent here is section 2402, subdivision (d)(5), which refers to Battered Woman Syndrome.

cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the [Board's] decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the [Board's] decision." (*In re Rosenkrantz, supra,* 29 Cal.4th at p. 677.) *Lawrence,* which clarified the standard articulated by *Rosenkrantz,* did not change this aspect of judicial review. We do not, for example, decide that some evidence is inconsequential or that the Board should have credited the inmate's version of the commitment offense. That is reweighing, which is not our role. (See *In re Palermo* (2009) 171 Cal.App.4th 1096 (dis. opn. of Nicholson, J.).)

On the other hand, the standard of judicial review of parole decisions "certainly is not toothless." (*Lawrence, supra,* 44 Cal.4th at p. 1210.) "[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights. If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by 'some evidence,' a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have no bearing on the paramount statutory inquiry. Such a standard, because it would leave potentially arbitrary decisions of the Board or the Governor intact, would be incompatible with our recognition that an inmate's right to due process 'cannot exist in any practical sense without a remedy against its abrogation.' " (*Id.* at p. 1211, quoting *In re Rosenkrantz, supra,* 29 Cal.4th at p. 664.) "Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of

certain factual findings." (*Lawrence*, *supra*, at p. 1212, quoting *In re Rosenkrantz*, *supra*, at p. 658.) Stated another way, not only must there be some evidence to support the Board's factual findings, there must be some connection between the findings and the conclusion that the inmate is currently dangerous.

In reviewing the order of the trial court, which was based solely upon documentary evidence, we independently review the record. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.)

V. DISCUSSION

The Board relied upon three factors in denying parole: the nature of the commitment offense, Sauers's plans to parole to Texas, and the most recent psychological report finding him to be a "moderate" risk of violence if released and in need of further self-help programming.

There is some evidence to support the Board's finding that the commitment offense was committed in an especially egregious manner. Indeed, this court upheld the Board's 2004 parole denial where the Board had "made clear that the circumstances of [Sauers's] commitment offense were determinative." (*In re Sauers* (Sept. 26, 2006, H029382) [nonpub. opn.].)[5] That analysis, however, preceded the Supreme Court's decision in *Lawrence*. As *Lawrence* acknowledged "there are few, if any, murders that could *not* be characterized as . . . particularly aggravated." (*Lawrence, supra*, 44 Cal.4th at p. 1218.) "[T]he statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Id.* at p.

[5] On the court's own motion, we have taken judicial notice of the opinion filed in connection with Sauers's 2004 parole suitability hearing.

1211.) Thus, "the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Id.* at p. 1221.)

In *Lawrence*, for example, the Supreme Court found the nature of the commitment offense, while egregious, was not some evidence of the inmate's current dangerousness. The offense occurred under an unusual amount of emotional stress, which according to all psychological evaluations, had arisen from circumstances that were not likely to recur. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1225-1226.) Further, during her 24 years of incarceration, the inmate had "an exemplary record of conduct." She had "participated in many years of rehabilitative programming specifically tailored to address the circumstances that led to her commission of the crime, including anger management programs as well as extensive psychological counseling, leading to substantial insight on her part into both the behavior that led to the murder and her own responsibility for the crime. Petitioner repeatedly expressed remorse for the crime, and had been adjudged by numerous psychologists and by the Board as not representing any danger to public safety if released from prison." (*Id.* at p. 1226.) Every other regulatory factor favored release. The Supreme Court concluded that "the unchanging factor of the gravity of petitioner's commitment offense had no predictive value regarding her *current* threat to public safety," and, therefore, provided no support for the conclusion that she was unsuitable for parole. (*Ibid.*)

In contrast to *Lawrence*, *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), which was filed concurrently with *Lawrence*, exemplified the situation where an egregious crime remained probative of current dangerousness. Shaputis was 71 years old. He had been in prison and discipline-free for more than 20 years. He had an excellent work record and had participated in numerous institutional programs to enhance his ability to function in the community. Nevertheless, the Supreme Court concluded that the record

supported the Governor's finding that Shaputis was unsuitable for parole. (*Id.* at pp. 1245-1246, 1249.) The commitment offense was not an isolated incident, like that of *Lawrence*. "Instead, the murder was the culmination of many years of petitioner's violent and brutalizing behavior toward the victim, his children, and his previous wife." (*Shaputis, supra*, 44 Cal.4th at p. 1259.) Shaputis's lack of insight into the reasons for the murder, his history of domestic abuse, and psychological reports documenting his lack of insight "all provide some evidence in support of the Governor's conclusion that petitioner remains dangerous." (*Id.* at p. 1260.)

The full record before the Board in the present case contained evidence of numerous factors that would weigh in Sauers's favor. As the Board acknowledged, Sauers had not engaged in any misconduct while in prison, his participation in institutional activities was commendable, he had no history of committing crimes as a juvenile and no criminal history, and he had the support of his family and enough money to live on when released. The only unsuitability factors the Board cited other than the nature of the commitment offense were Sauers's plan to live in Texas and Twohy's determination that he lacked insight into the cause of the murder and needed to participate in more "self help." The Board did not explain how these unsuitability factors were linked to its conclusion that Sauers was currently dangerous. The Warden argues that the existence of some evidence to support the two unsuitability factors requires this court to uphold the Board's decision. According to the Warden, *Lawrence* does not require the Board to articulate a "nexus" between the evidence and its decision unless the Board relies only upon the commitment offense to deny parole.

We agree that *Lawrence* does not require that we overturn a parole denial solely due to the absence of some pro forma recitation on the record. There undoubtedly are cases where the inmate's record is so clearly probative of dangerousness that no explicit reasoning is required. (See, e.g., *Shaputis, supra*, 44 Cal.4th 1241.) But to the extent the Warden suggests that we need not look for a connection between the cited factors and the

Board's ultimate decision, the argument goes too far. The heart of the due process requirement is that the *Board* assess the evidence to decide whether, in its view, the inmate is presently dangerous. As has been repeatedly emphasized, this requires an individualized consideration by the Board of the specified criteria. (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.) The relevant inquiry on review is whether some evidence supports the Board's conclusion that the inmate constitutes a current threat to public safety, not merely whether some evidence confirms the existence of the factual findings. (*Lawrence*, *supra*, 44 Cal.4th at p. 1212.) At minimum, therefore, the Board's reasoning must be discernable from the record. (See *In re Criscione*, *supra*, 173 Cal.App.4th at p. 75 [reason for finding of current dangerousness was not apparent from Board's rote recitation of unsuitability factors].)

In the present case, the Board cited Twohy's psychological report as an unfavorable factor. But the Board did not mention the other psychological reports to which both the Santa Clara County deputy district attorney and Sauers's own attorney referred at the hearing. According to Sauers's argument at the hearing, the unanimous conclusion of the many psychologists other than Twohy who interviewed Sauers over the last 20 years found him to present a low or minimal risk for future violence in the free community. The argument is corroborated by copies of several such reports attached to Sauers's habeas petition. If, indeed, there were 20 years of positive psychological reports in the record before the Board, the Board's failure to acknowledge them is a glaring discrepancy that is left unexplained. It is, of course, up to the Board to weigh this evidence but here it is not clear that the Board considered it at all. Further, the Board did not mention the most obvious favorable factor--that the crime had been committed in the course of a heated argument over the victim's infidelity. Nor did the Board recognize that the crime was an isolated incident in an otherwise entirely nonviolent life--a factor that the regulations specifically identify as showing suitability. Rather, the Board suggested that Sauers's lack of a violent history showed instead that he was *unsuitable*.

These circumstances--the apparent discrepancy between Twohy's report and every other psychological evaluation and the Board's failure to mention the most obvious favorable factors--cause us to question whether the Board applied the reasoning *Lawrence* demands and whether the Board had Sauers's record fully in mind when it recited its decision. Indeed, at one point the Board stated, "we did have a plea" to the murder, suggesting that the Board believed that Sauers had been convicted by plea when, in fact, a jury had found him guilty.

The Board also stated that Sauers's plan to parole to Texas, which was described by the Life Prisoner Evaluation prepared in June 2007 as "reasonable and well thought out," prohibited the Board from finding Sauers suitable for parole. But the Board did not explain how the plan supported a finding that Sauers is currently dangerous nor is that conclusion inherent in the fact that the inmate plans to live with his sister in Texas.[6] In short, the basis for the Board's decision that Sauers remains a threat to public safety is not apparent from the record before us.

Our concern is reinforced by the timing of the hearing in this case. The hearing followed this court's decision upholding the Board's 2004 parole denial, which was based primarily upon the gravity of the commitment offense. (*In re Sauers* (Sept. 26, 2006, H029382) [nonpub. opn.].) Since then, *Lawrence* clarified that the Board's reliance upon the commitment offense is sufficient only if there is some rational nexus between it and the determination that the inmate is currently dangerous. But *Lawrence* was not decided until after the Board reached its decision in this case. A review of the instant decision demonstrates that the Board again relied heavily, albeit not exclusively, upon the nature of Sauers's commitment offense in concluding that he was unsuitable for

[6] We note that the process for transferring parole to a sister state cannot be commenced until the inmate is given a parole date. (See Interstate Commission for Adult Offender Rules, rule 3.105, stating that the application cannot be made sooner than 120 days prior to the scheduled release date.)

parole. In light of this and the circumstances cited above, we cannot tell whether the Board would have denied parole if it had had the guidance of *Lawrence* at the time of the hearing in this case. The most prudent course under these circumstances was to allow the Board to conduct a new parole hearing in light of *Lawrence.* (See *In re Criscione*, *supra*, 173 Cal.App.4th at pp. 78-79.) Accordingly, we agree with the superior court that remand was warranted. We express no opinion about whether the Board should have found Sauers suitable for parole.

As to the order itself, we detect no error. The superior court ordered the Board to "conduct a further hearing under the guidelines set forth by the California Supreme Court." This is the same thing as ordering the Board to proceed according to due process, which is the order the Warden seeks. It is true that the court mentioned in its order, as we have mentioned above, its concern that the Board did not consider that the crime was committed as the result of an accumulation of life stress. That observation does not preclude the Board from undertaking a full review and considering all relevant evidence.[7]

[7] Sauers argues that the superior court gave too much deference to the Board and that we should modify the ruling and order his immediate release. In the alternative, Sauers contends that we should modify the ruling to order the Board to find him suitable for parole absent new evidence to show that he is a current public safety risk. Since Sauers did not request this relief in his petition for habeas corpus, and since he has not filed a cross-appeal, the issue is not properly before us. (Cf. *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439; *California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7.)

VI. DISPOSITION

The order of the superior court is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Duffy, J.